STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 2, 2011
V	No. 297616 Berrien Circuit Court
RODNEY DARRELL WALTERS, Defendant-Appellant.	LC No. 2009-001839-FC

Before: BECKERING, P.J., and FORT HOOD and STEPHENS, JJ.

PER CURIAM.

Defendant appeals his sentence, which was imposed following a jury trial in which he was convicted of armed robbery, MCL 750.529, first-degree criminal sexual conduct (CSC I), MCL 750.520b, first-degree home invasion, MCL 750.110a(2), felon in possession of a firearm, MCL 750.224f,[1] and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant as a second habitual offender to prison for a term of 35 to 75 years for the armed robbery conviction, 35 to 75 years for the CSC I conviction, 160 months to 20 years for the home invasion conviction, 38 months to 5 years for the felon in possession conviction, and two years for the felony-firearm conviction. The felony-firearm sentence was to be served consecutive to and preceding the other sentences. The armed robbery and felon in possession sentences were to be served concurrently. The CSC sentence was to be served consecutively to the armed robbery sentence, and the home invasion sentence was to be served consecutively to the CSC sentence. We affirm and find that the sentence was not unlawful despite the likelihood that defendant will be in prison for life. Moreover, the sentence was not disproportionate. Finally, the court was permitted to stack the consecutive sentences.

Because the defendant neither challenges the jury verdict nor the guidelines scoring in this case, the Court will give only a cursory overview of the facts of the underlying offense. In summary there was evidence that the defendant, along with three others, committed a home invasion. During the home invasion that occurred at approximately 4:00 a.m. on January 5,

[1] The judgment of sentence mistakenly references MCL 750.227b (felony-firearm) in conjunction with this conviction.

2008, defendant participated in multiple acts of criminal sexual conduct against the female homeowner while brandishing firearms.

The defendant argues that his sentence was disproportionate, constitutes an impermissible life sentence without parole and was illegally stacked. While defendant requested that all the sentences be concurrent rather than consecutive, he never argued that the court lacked authority to impose the consecutive sentences. Therefore, the issues are not preserved. Because these issues are unpreserved, defendant "must show a plain error that affected substantial rights." *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). However, "[g]enerally 'a defendant is entitled to resentencing where a sentencing court fails to exercise its discretion because of a mistaken belief in the law.'" *People v Sexton*, 250 Mich App 211, 228; 646 NW2d 875 (2002), lv den 467 Mich 949 (2003), quoting *People v Green*, 205 Mich App 342, 346; 517 NW2d 782 (1994).

Defendant cites *People v Moore*, 432 Mich 311; 439 NW2d 684 (1989), for the proposition that his sentence cannot stand since he would be 105-years-old when the aggregate minimum sentence would be complete. In *Moore*, the Court held that an indeterminate sentence is invalid if, in effect, it precludes the possibility that the defendant will be eligible for parole during his lifetime. However, this Court has recognized that the Supreme Court effectively overruled *Moore* in *People v Merriweather*, 447 Mich 799; 527 NW2d 460 (1994). See *People v Kelly*, 213 Mich App 8, 15-16; 539 NW2d 538 (1995), lv den 453 Mich 927 (1996), rec den 455 Mich 874 (1997). In *Kelly*, this Court held that resentencing is not necessarily required when a defendant is sentenced to an indeterminate sentence that is effectively a life term. The Court stated:

> In *Merriweather, supra*, the Court was faced with the same issue as that in *Moore*, i.e., whether the trial court erred in sentencing the defendant to a sixty-year minimum term because that sentence denied him the opportunity for parole. Justice Boyle wrote for the majority in *Merriweather*, and . . . upheld the defendant's sentence.
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> Without explicitly mentioning or overruling *Moore*, the majority in *Merriweather*, *supra* at 809, determined that "the fact that the defendant is not eligible for parole appears to be precisely what the Legislature intended." The majority reasoned that the sentence was appropriate because it was within the permissible range for first-degree criminal sexual conduct, i.e. life or any term of years, and it was indeterminate, it called for a 60- to 120-year term of imprisonment.
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> The majority, in conclusion, made the following statement:
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> > Assuming arguendo, "the only possible rationale for sentencing the defendant . . . was to effectively prevent the Parole Board from assuming jurisdiction," that is the precise result the electorate sought and obtained in the passage of Proposal B[, which mandated that a defendant serve the minimum sentence of a term of years sentence. . . . .]

> [*Kelly*, 213 Mich App at 14-15, quoting *Merriweather*, 447 Mich at 810-811(citation omitted by *Kelly*).]

The Court in *Kelly*, 213 Mich App at 16, also concluded that relief from such a sentence would be afforded only if it was disproportionate under the standard set forth in *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990) (the sentence must be proportionate to the seriousness of the circumstances surrounding the offense and the offender).

Defendant argues that his aggregate minimum sentences violated the principle of proportionality. In *People v Hardy*, 212 Mich App 318, 320-321; 537 NW2d 267 (1995), lv den 451 Mich 909 (1996), the defendant was sentenced to consecutive sentences for a probation violation arising out of a conspiracy to deliver cocaine conviction and the subsequent delivery of cocaine that gave rise to the probation violation. The Court stated:

> [C]ontrary to defendant's argument, his sentences should not be added together when reviewing their proportionality. This Court has repeatedly held that the proportionality of consecutive sentences should not be determined on a cumulative basis. *People v Landis*, 197 Mich App 217, 218-219; 494 NW2d 865 (1992); *People v Warner*, 190 Mich App 734, 736; 476 NW2d 660 (1991). [*Hardy*, 212 Mich App at 320-321.]

The defendant's sentence for the delivery of cocaine was within the sentencing guidelines range and thus, presumptively proportionate. *Id*. at 321. The 4 to 20 year sentence for the probation violation was also deemed proportionate. *Id.*; see also *People v Miles*, 454 Mich 90, 95; 559 NW2d 299 (1997). We are guided by the court in *Miles*, which stated "[W]here a defendant receives consecutive sentences and neither sentence exceeds the maximum punishment allowed, the aggregate of the sentences will not be disproportionate under [*Milbourn*]." Defendant does not argue that his individual sentences were disproportionate. None of the individual sentences imposed on this defendant are outside of guidelines, improperly scored or in excess of the maximum punishment allowed. Therefore, defendant's proportionality argument is without merit.

The next question is whether consecutive sentences may be stacked upon each other where separate statutes allow for consecutive sentences for crimes arising out of the same transaction. This question has not been directly decided by a court of this state.

Section 520b (3) of the CSC I statute provides as follows: "The court may order a term of imprisonment imposed under this section to be served consecutively to any term of imprisonment imposed for any other criminal offense arising from the same transaction." Similarly, MCL 750.110a (8) provides: "The court may order a term of imprisonment imposed for home invasion in the first degree to be served consecutively to any term of imprisonment imposed for any other criminal offense arising from the same transaction."

In *People v Piper*, 181 Mich App 583; 450 NW2d 72 (1989), which is similar to but distinguishable from the instant case, the defendant escaped from prison where he was serving a life sentence and committed murders in 1984 and rapes in 1985. *Id.* at 584. His 1986 sentence for the CSC crimes (including CSC I) was made consecutive to the original life sentence. *Id.* at

585. His 1988 sentence for the murders was made consecutive to the life and CSC sentences. *Id.* *Piper* held that the 1988 sentences were properly made consecutive to the 1986 sentences based on MCL 768.7a(1), which provides as follows:

> A person who is incarcerated in a penal or reformatory institution in this state, or who escapes from such an institution, and who commits a crime during that incarceration or escape which is punishable by imprisonment in a penal or reformatory institution in this state shall, upon conviction of that crime, be sentenced as provided by law. The term of imprisonment imposed for the crime shall begin to run at the expiration of the term or terms of imprisonment which the person is serving *or has become liable to serve* in a penal or reformatory institution in this state. [Emphasis added.]

Piper held that the 1988 sentences were properly made consecutive to the 1986 sentences because the defendant had "become liable to serve" the 1986 sentences. *Piper*, 181 Mich App at 586.

In the present case, both MCL 750.110a(8) and MCL 750.520b(3) allow for consecutive sentences for "any other criminal offense arising from the same transaction." It is does not limit the consecutive sentencing to one offense. Thus, the CSC sentence was properly made consecutive to the armed robbery sentence. The home invasion was yet another "criminal offense arising from the same transaction" as the CSC offense. Construed "liberally in order to achieve the deterrent effect," *Kirkland*, 172 Mich App at 737, just as the consecutive sentence statute was in *Piper*, MCL 750.110a(8) allows for the home invasion sentence to be made consecutive to the CSC sentence. The defendant argues that the sentence in this instance is effectively a life sentence without the possibility of parole. He notes that the only such offense in Michigan is first degree murder. However compelling that policy argument is, it has neither statutory nor case law support. If the legislature intends to limit the discretion of the court in this matter it must does so explicitly. Without such an express limitation, this Court must find that the stacking of sentences is permitted regardless of whether the aggregate sentence is effectively a life sentence without the possibility of parole.

Affirmed.

/s/ Jane M. Beckering
/s/ Karen M. Fort Hood
/s/ Cynthia Diane Stephens